

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON ADVOCACY CENTER,  
et al.,

Plaintiffs,

v.

BOBBY MINK, et al.,

Defendants.

Case No. 3:02-cv-00339-MO

JAROD BOWMAN, et al.,

Plaintiffs,

v.

DELORES MATTEUCCI, et al.,

Defendants.

Case No. 3:21-cv-01637-MO

LEGACY HEALTH SYSTEM, et al.,

Plaintiffs,

v.

PATRICK ALLEN,

Defendant.

Case No. 6:22-cv-01460-MO

November 21, 2022

Portland, Oregon

**Oral Argument**

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT SENIOR JUDGE

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(P R O C E E D I N G S)

(November 21, 2022; 1:35 p.m.)

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THE COURTROOM DEPUTY: We are here this afternoon for oral argument in Case No. 3:02-cv-339-MO, Oregon Advocacy Center v. Mink, et al.

THE COURT: Thank you all for being here today. I want to start with some preliminary comments and then hear arguments, particularly from intervenors here who haven't had this opportunity.

I want to back up a little bit and just sort of remind us how we got here. I'll say at the outset that you could probably scour the country and not find a federal judge more reluctant than I am to step on the prerogatives of those working hard to solve these problems in government and elsewhere, and most particularly the prerogatives of my friends and colleagues on the state court trial bench who deal with these issues so frequently and at such a personal level. But we're here because, as Judge Panner found some time ago, the Constitution requires something better than allowing people found unable to aid and assist to languish in jails for a long time without getting the care that they need. And so it's a little more complicated than that as it unfolds, but what the Constitution demands is pretty much literally what I'm hired to enforce, and so that's how we got here in the first place.

1           In the course of that, I received evidence and  
2 engaged the work of Dr. Pinalis and others to take a look at the  
3 problem of how the state statutory system was impacting the  
4 ability to get people out of jails and into OSH. And that  
5 lengthy evidentiary trail led me to the conclusion that an  
6 otherwise textually neutral state statute was resulting --  
7 directly resulting in these constitutional violations, so I  
8 issued the order that is the subject of intervenors' motions.

9           Because it's textually neutral, it raises issues that  
10 are somewhat different from a court simply finding that a  
11 statute is on its face unconstitutional, and I left open the  
12 possibility at our last hearing that that might raise what I'll  
13 call direct constitutional challenges to my authority to issue  
14 such an order. I think I'm of the mind that what I have in  
15 front of me here today isn't that sort of challenge. It's not  
16 a -- it's not a challenge that says sort of from the get-go  
17 that I just don't have any authority to issue such an order.  
18 Rather it's a challenge under the test for such orders, which  
19 focuses on using the least restrictive means. That is sort of  
20 a mixed question of law and fact.

21           I've never really been fond of that phrase. It's the  
22 phrase that the Ninth Circuit uses when they want to reverse  
23 me, so I'm reluctant to use it today, but that's sort of what  
24 it is. Everyone agrees on the general standard in play here,  
25 and to answer the question whether I have used the least

1 restrictive means to solve this problem through the order  
2 requires looking not just at the test itself but the facts on  
3 the ground. And the parties have done their best, I think, to  
4 try to make their arguments to me that there are other less  
5 intrusive means that could be used on the one hand, or on the  
6 other hand that the means I have chosen results in drastically  
7 more significant burdens or harms or failures than perhaps I  
8 had contemplated. That's the kind of arguments I have in front  
9 of me here today.

10           Again, just on my tentative views -- I'm not making  
11 any decision right now, I'm very interested in what you have to  
12 say -- it does appear that to a large degree -- not a hundred  
13 percent but to a large degree I'm faced with the order that is  
14 grounded in a substantial body of evidence carefully acquired  
15 and vetted for purposes of reliability on the one hand  
16 versus -- again, I don't mean to say this is 100 percent, but  
17 versus concerns about how the order will play out in the future  
18 on the other, not grounded yet -- it can't be -- not grounded  
19 yet in solid evidence or data. If I'm right about that, of  
20 course, then one thing to do is to wait at least a little while  
21 to see if the feared and predicted negative outcomes that would  
22 impact whether this is the least restrictive method or means  
23 really pan out.

24           I have also, of course, arguments that there are  
25 other things I could do that while true and important are

1 more -- significantly more long term and don't even purport to  
2 solve the problem in any shorter medium term. For example,  
3 it's true, as it has been briefed, that a better solution to  
4 this problem than what the order does perhaps is to have more  
5 facilities and hire more people in the mental health field.

6 I can only say that I hope that day comes --  
7 fervently hope that day comes, but it's not a solution that  
8 evades the constitutional violation in anything like the short  
9 or middle term, and of course even now Jacksonville is a good  
10 example. Getting something up and running and hiring enough  
11 people to work there is a significant challenge. Ask anyone  
12 who is hiring anybody in the -- well, in the health field, let  
13 alone the mental health field right now.

14 I should say that that's a better -- I said a moment  
15 ago that was a better solution, but I will say that the shorter  
16 terms at OSH mandated by the order aren't simply desperate  
17 expediciencies adopted to get more people in through the front  
18 door by hurrying them out the back door. Instead that's also  
19 grounded in data and evidence and research about how long it's  
20 useful to keep people in that position factually and legally  
21 before trying the next thing. But in any event, my general  
22 impression is that overall the order should stand until it  
23 plays out for a while to see whether some of the worst outcomes  
24 really happen.

25 There is one argument that isn't encompassed by

1 anything I've said yet, and that's the challenge raised by the  
2 hospitals to Section 2.b., and the high bar set in that section  
3 for civil commitments. And there's multiple arguments made  
4 about that. One is that it's such a high bar that I'm leaving  
5 dangerous people out, not cared for or not committed, at least,  
6 and that I'm even leaving people out who should be civilly  
7 committed who don't meet the high bar but that are -- but who  
8 are more dangerous than people that are getting committed under  
9 my order.

10 And then the second argument is that because of  
11 the -- because of the shortened timetables, more people will be  
12 released sooner, and the prediction is that they're just going  
13 to end up civilly committed because they weren't in long  
14 enough, and then they bump up against Section 2.b. or just  
15 against the inability to get very many people civilly  
16 committed, and that will be a problem.

17 As to the high bar, I guess what the parties agree to  
18 is that that bar actually didn't come out of the blue. It  
19 represents a codification of the status quo ante -- in fact,  
20 the status quo ante for quite some time. And the parties to  
21 the litigation -- not the intervenors -- have briefed that both  
22 that is true, which in a hydraulic system makes me concerned  
23 about changing it, and also that there are mechanisms built  
24 into the system to create a more individualized assessment for  
25 where that's necessary.



1           So those are my tentative thoughts. I thought I'd  
2 start -- well, we'll just run. I think you've been given  
3 certain timetables. Those are flexible. We'll see where we go  
4 and we'll just start with the intervenors.

5           I don't know which of you goes first.

6           MS. VETTO: Your Honor, for the record, I'm Jane  
7 Vetto with Marion County. I believe under your original order  
8 you invited Amicus Marion County and Washington County to split  
9 their time, and then I think the other intervenors and the  
10 amicus have 15 minutes.

11          THE COURT: Very well. And if you want to go first,  
12 if you'd pull that microphone a little closer to you.

13          MS. VETTO: I was wondering if I could use the  
14 podium.

15          THE COURT: Yes, that's fine.

16          MS. VETTO: Thank you, Your Honor.

17          Again, for the record, I'm Jane Vetto. I am Marion  
18 County counsel, and I'm here on behalf of the amicus counties,  
19 Marion and Washington County. As I said to Mr. Carr, I will be  
20 dividing our argument time.

21          I'm going to begin by addressing the Court's  
22 doctrinal question and the applicable law which requires the  
23 Court to make findings on the record when contravening state  
24 law that the remedy is the least intrusive alternative  
25 available to the Court, and then Mr. Carr will discuss those

1 potential alternatives. At the close of the hearing, we will  
2 ask the Court to find that the remedies on September 1st were  
3 not the least intrusive alternatives and that the Court rescind  
4 its September 1st order in whole or at least in part.

5           Before I address the legal authority and  
6 requirements, though, I would like to briefly comment on the  
7 statements that the plaintiffs made in their response brief,  
8 questioning why Marion and Washington Counties are even here,  
9 because the counties are only indirectly affected by the  
10 Court's September 1st order. Unfortunately, that's not true.  
11 Mr. Carr and I were directed by our respective county governing  
12 bodies to request this Court allow us to appear as amicus  
13 because the September 1st order directly impacts how each of  
14 our two largest county departments serve the approximately  
15 1 million Oregonians that collectively live in our two  
16 counties. Specifically, our county health departments and our  
17 sheriff's office jail divisions carry out the local  
18 implementations of the Oregon aid-and-assist statutes. The  
19 September 1st order shifts additional responsibility and  
20 liability on to them from the State, which is a significant  
21 departure from Oregon law.

22           Regarding the health department, the September 1st  
23 order will absolutely result in a large increase in community  
24 restoration workers, straining already limited local staffing  
25 resources. More importantly, though, the county health

1 departments are now being asked to provide community  
2 restoration to individuals who, as they're being released  
3 early, may still at some point need a hospital level of care.  
4 Under the aid-and-assist statutes, local health departments  
5 cannot involuntarily medicate aid-and-assist patients. They do  
6 not have any ability to direct SRTF beds. Again, that control  
7 lies with the State. So when aid-and-assist individuals on  
8 community restoration need a hospital level of care, there's no  
9 ability for the county to have the State Hospital take these  
10 individuals back.

11 THE COURT: Could I pause you there for just a  
12 moment.

13 MS. VETTO: Yes.

14 THE COURT: So based on what is your premise that  
15 people being released earlier than the state statute previously  
16 allowed, or at least earlier than the maximum in the state  
17 statute will result in releasing people who need a hospital  
18 level of care?

19 MS. VETTO: That's a good question, Your Honor. I am  
20 using the information that I have actually from our jails. And  
21 I can talk a little bit about that, but if people coming out of  
22 the state --

23 THE COURT: I guess I'm just -- it's hard to have  
24 information -- right? -- if it hasn't happened much yet. So  
25 are you getting it from some other analogous situation where

1 you have to add up somehow already?

2 MS. VETTO: So I've talked to our health department  
3 director, I've talked to our behavioral health managers, and  
4 I've also talked to our jail staff. And what their findings  
5 are, even without this order, what happens is when people come  
6 out from the State Hospital, if they come out and they're put  
7 either on community restoration or they come back into the  
8 jail, many times if they don't -- if they take their  
9 medication, great, but if they don't, they decompensate, and  
10 there is no way for the county either through the health  
11 department or through jail staff to involuntarily medicate  
12 them.

13 THE COURT: I understand that very regrettable  
14 situation.

15 MS. VETTO: Yes.

16 THE COURT: I've experienced it in many cases that  
17 I've had --

18 MS. VETTO: Yes.

19 THE COURT: -- although not with the frequency that  
20 your state court judge have. But the question remains, this  
21 process of getting out and then not taking your medication and  
22 decompensating, based on what do you think that the percentage  
23 of people who experience that will go up if we release them  
24 earlier as opposed to stay the same?

25 MS. VETTO: I think -- I think anecdotally the

1 more -- the more hospitalization -- or the more hospital level  
2 of care for psychotic and schizophrenic individuals, the more  
3 time that they have to stay on their medication and also to  
4 receive the therapies that they receive at the State Hospital,  
5 the more stable they will be.

6 THE COURT: I appreciate that anecdotally, and I'm  
7 only pressing because it's a very important point, not because  
8 I'm trying to quibble with you at all. I know it's a serious  
9 argument. But the deadlines for release were created grounding  
10 in social science research suggesting that these are actually  
11 the optimal time periods for some of these situations, or at  
12 least if not optimal, better than significantly lengthier  
13 times. In other words, your premise is the longer they're in,  
14 forced to take meds, the more stable they'll be when we let  
15 them out. But that premise isn't backed up by social science  
16 research.

17 MS. VETTO: That's not exactly -- and if I said that,  
18 that's not what I meant. If you have an arbitrary timeline  
19 when someone has to be released, then if they're released in  
20 that arbitrary timeline, whether it's 90 days, whether it's six  
21 months, or a year, and they're not ready to go, recidivism is  
22 very likely. It happens all the time now that people come back  
23 restored, able -- or able with meds before three years, before  
24 one year. But that assessment is made. And here that  
25 assessment is removed. They're just coming back. And that is

1 what I'm talking about.

2 THE COURT: All right. Thank you very much.

3 MS. VETTO: Thank you very much.

4 On the flip side of the health department -- and I  
5 kind of alluded to this -- there will be some individuals  
6 released from the State Hospital who can, of course, be decided  
7 need to return to the jail to protect the community. And that  
8 is entirely understandable. But in the jail, as we discussed,  
9 if these individuals continue to take the medication prescribed  
10 by the hospital, great. But if, as often happens, they stop  
11 taking their medication, under the September 1st order, the  
12 jails can no longer return them to the State Hospital for  
13 further treatment, and that is a change. That is a change.  
14 Before the jails could put them back on the list for further  
15 treatment. Now they can't. So our jails are facing increasing  
16 Eighth and Fourteenth Amendment concerns, corresponding risk  
17 liability issues, staff safety, and other adult-in-custody  
18 safety concerns stemming from housing unmedicated psychotic and  
19 schizophrenic individuals and corresponding jail capacity  
20 management issues.

21 THE COURT: Could I ask, the method you say  
22 previously existed that is gone, was that method something  
23 different than the jail saying someone has come out of OSH with  
24 capacity restored, but we view them as still a danger, we want  
25 them recommitted? Was that a civil commitment process or

1 something else?

2 MS. VETTO: No. What will happen is that people will  
3 come back and they're, like, never with meds. So they'll come  
4 back into the jail with their Measure 11, and that person will  
5 take their medications. But once they stop -- and they often  
6 do stop -- they decompensate to the point where the jail  
7 just -- you know, they can't keep that person there any longer.

8 THE COURT: And then what happened a few years ago  
9 with that person?

10 MS. VETTO: So they would put them on a list and say  
11 to the State Hospital, please go ahead and take them back. And  
12 there was like a release valve.

13 THE COURT: On what capacity? Not on aid and assist  
14 because they'd been restored?

15 MS. VETTO: Well, if they still had time on their  
16 three years. So they would be able to bring them back if they  
17 hadn't reached that cap.

18 THE COURT: Well, that's my question. So someone had  
19 to say, you're going back because now, even though you were a  
20 few weeks ago able to aid and assist, now we think you're not,  
21 but somebody had to make that finding and say, you can't aid  
22 and assist, right?

23 MS. VETTO: Yes. And the courts do make that  
24 finding.

25 THE COURT: And was that finding -- once again you're

1 not able to aid and assist, not civil commitment but send them  
2 back?

3 MS. VETTO: It's our understanding, based on some  
4 FAQs that OHA sent out on the 16th, that the jail no longer has  
5 the ability to request that recourse from the courts. If that  
6 is not a part of your order, we would appreciate some, you  
7 know, some discussion about that, because that would be a big  
8 ask. That would be a big win for us.

9 THE COURT: You're suggesting that if someone has  
10 competency restored and then gets back into the normal criminal  
11 justice system heading to trial, and for whatever reason,  
12 including not taking their meds, competency is lost and a judge  
13 finds that competency has been lost, that you can't send that  
14 person to OSH a second time?

15 MS. VETTO: It is our understanding that the State  
16 Hospital will not accept them.

17 THE COURT: Okay. Thank you.

18 MS. VETTO: So the September 1st order directly  
19 creates additional safety, security, and liability risks for  
20 counties, and that is why we are here today.

21 So turning to the legal question, the Court asked us  
22 to address whether a federal court has the ability to order  
23 noncompliance with state law, and in this case Senate Bill 295,  
24 codified in ORS Chapter 161, in order to comply with  
25 constitutional requirements. And we can all agree that the



1 answer is yes. This Court has broad equitable powers to  
2 address constitutional violations, including contravening state  
3 law, but the body of federal case law cited in our brief from  
4 the U.S. Supreme Court to the Ninth Circuit makes it clear that  
5 this step can only be taken if the Court makes a specific  
6 finding that such an action is the least intrusive option  
7 available to it. The September 1st order is silent as to  
8 whether the ordered actions are the least intrusive  
9 alternatives. It does not contain the required findings  
10 because the parties never asked the Court to make them, likely  
11 because, as Mr. Carr will discuss, there are actually several  
12 less intrusive alternatives available for the Court to  
13 implement.

14           Whether the Court ultimately agrees with that or not,  
15 though, federal law still requires that these findings be made.  
16 And again, in our brief we cite numerous cases, starting with  
17 the *Missouri v. Jenkins* case to the *Stone* case to the *Arizona*  
18 *v. the Department of Corrections* case which followed this  
19 precedent.

20           We also cite to the *Trueblood v. Washington State*  
21 *DSHS* case because it deals with almost identical facts to the  
22 present case. In *Trueblood*, the plaintiff sued over delayed  
23 competency evaluations, and while that case was pending, the  
24 Washington state legislature stepped in and passed legislation  
25 requiring that evaluations be done between the seven- and

1 21-day window. And after the legislation was passed, the Court  
2 looked at it and said that's not sufficient, and ordered a  
3 seven-day evaluation. And on appeal, the Ninth Circuit said  
4 two things. They said first that the district court didn't  
5 identify that contravening the legislative fix was the least  
6 intrusive alternative, and they further found that actually in  
7 that case the least intrusive alternative would have been  
8 given -- would have been to give the legislative fix time to  
9 work. And again, Mr. Carr will talk more about that in detail,  
10 but I did want to mention it here.

11 So in response to this, the plaintiffs make two  
12 different arguments. And first they say, well, the counties  
13 are disputing the Court's ability to contravene state law. No,  
14 we're not. But what we're doing is, as amicus, informing the  
15 Court that it needs to make these findings. It just doesn't  
16 appear the Court was informed of that requirement by the  
17 parties in the earlier proceedings.

18 Then the plaintiffs argue that the Court doesn't  
19 actually have to make findings because it relied on an expert's  
20 report. Again, yes, courts can rely on experts. They do it  
21 all the time. But that doesn't negate the Court's need to make  
22 its own findings that contravening state law is the least  
23 intrusive alternative.

24 And it's also important to note that Dr. Pinal's  
25 report never says that reducing statutory treatment times is

1 the least intrusive alternative. In fact, her June 5th report  
2 implies the opposite. In that report she lists 14 things that  
3 the State Hospital can do on their own right away to improve  
4 admission times, like hiring more forensic evaluations,  
5 expanding drug treatment for aid-and-assist patients, stopping  
6 the 30-day hold, et cetera. All of these things and more she  
7 recommends that the State Hospital does.

8 And then much later in the report, she says, well,  
9 here's six more things you can do, but they're going to require  
10 a legislative fix, they're going to require some rule making,  
11 or they're going to require Court intervention. So not the  
12 least intrusive alternatives. And of these six things, she  
13 includes reducing the treatment times and stopping civil  
14 commitment admissions.

15 The parties apparently latched on to this  
16 recommendation, even though it's not a primary recommendation  
17 in her report, and it's also not identified as least intrusive.  
18 But it was presented to this Court as if it was the only  
19 feasible alternative. And the record shows that it isn't. But  
20 even if this Court decides that it is, there needs to be a  
21 specific finding.

22 So with that summary of the law, I'm going to turn  
23 the rest of the argument -- the rest of my time over to  
24 Mr. Carr. He's going to talk about less intrusive  
25 alternatives, many of which I know were listed in Dr. Pinal's

1 report but were not presented to this Court by the parties.

2 THE COURT: Thank you very much.

3 MS. VETTO: Thank you.

4 THE COURT: Mr. Carr.

5 MR. CARR: Thank you, Your Honor.

6 As the counties, we share the concern about seriously  
7 mentally ill people being in our jails. When the -- the  
8 decision to criticize amicus not for being -- was bolstered by  
9 the fact that I was not sure what side we should be on.

10 THE COURT: Why don't you go ahead and be seated, if  
11 that won't bother you too much.

12 MR. CARR: It does a little, Your Honor, but I will  
13 do that. Thank you.

14 But the concern about the order is it's a blunt  
15 instrument and it leaves no discretion to hold somebody in the  
16 hospital past the deadlines that needs hospital care. So the  
17 Court asked the question about releasing people who still need  
18 a hospital level of care. As I read the order, the hospital is  
19 compelled to release those individuals if they're beyond the  
20 time limit stated in paragraph 3. If that's not the Court's  
21 intent, it would be terrific if the order were modified at  
22 least to say that anybody who still needs a hospital level of  
23 care does not have to be released.

24 THE COURT: Fair point. That wasn't quite my  
25 question, though. My question was why would one assume that

1 shortening the timetable for release will necessarily result in  
2 people being released who need -- more people being released  
3 who need a hospital level of care but being released anyway  
4 compared to the current regime?

5 MR. CARR: Well, as I read Dr. Pinals' report, she  
6 said that most people get most of their treatment in the first  
7 180 days, and the benefits after the first 180 days drop off  
8 drastically. But there are still people that need treatment at  
9 180 days, and those people will be released under this Court's  
10 order.

11 This document that I have on the projector was  
12 Exhibit 2 to Derek Wehr's report, and it reports on the  
13 releases that have been done so far under the Court's order.  
14 As you can see, from September 1st to October 26 -- 56 days --  
15 there are 154 patients released from the hospital. The vast  
16 majority of the patients were released under Senate Bill 295.  
17 Only seven were released under this Court's order. And as you  
18 saw from the hospital's brief, most of those ended up in  
19 private hospitals.

20 What we're seeing is an order that isn't necessary to  
21 achieve the Court's goal but has significant, significant  
22 detriments. And one of the things I'd like to point out about  
23 this chart here, if you look at the third box over,  
24 "restoration outcomes," there's a blank in the third level.  
25 Nobody has been released who has a violent felony. And so what

1 we're seeing is the lower-level offenders are being released  
2 first. So there's some prioritization going on that we're not  
3 aware of, having been privy to. But if you look at Dr. Pinal's  
4 report, she says that they've negotiated that, that they're  
5 staggering the discharge of those who reach the end of the  
6 restoration time periods, balancing the severity of the charges  
7 with the burdens to the community system.

8           So what I would ask is is there a way to incorporate  
9 that flexibility into the order so the hospital isn't forced to  
10 discharge into the community someone who is significantly  
11 dangerous. I did the math on these numbers, and if you take  
12 the 154 people released, and you divide it by 56 and multiply  
13 it by 365 and then divide it by 12, you get 83 people a month,  
14 which is what the -- what they're projecting. If you take out  
15 the seven, you get 80 a month. So if this -- if this data  
16 holds, we have a reduction of three people per month, but far  
17 less risk to the community if we just follow what the  
18 legislature adopted in Senate Bill 295.

19           The other thing we argued about was whether or not  
20 they had exaggerated the number of -- the length of the  
21 waitlist. So this document shows the two charts that were  
22 included in Dr. Pinal's second report. And as you can see, the  
23 chart on the left has a wait period, average days waiting of  
24 19.8 days for --

25           THE COURT: I'd ask you to slow down a little.

1 MR. CARR: I'm sorry.

2 It was 16.2 in May. The chart on the right, which is  
3 the chart that the plaintiffs relied upon, and that had the  
4 39.2 in July. And the difference between the two charts is the  
5 one on the left includes all the patients in the hospital in  
6 those months. So a patient who has been there for a year, who  
7 waited 40 or 50 days or a hundred days because the hospital  
8 wasn't accepting anybody by COVID -- because of COVID is  
9 included in that right-hand chart. The left-hand chart is the  
10 more accurate one. It includes only people waiting in the  
11 jail. So -- and that's the constitutional imperative. So I'm  
12 not saying that 20 days is acceptable. We'd prefer that to be  
13 zero. But it's not 40 days. Forty days is overinclusive. And  
14 that was explained in Mr. Wehr's declaration.

15 The other thing in Mr. Wehr's declaration that is  
16 troubling is that there are 97 people at the hospital today --  
17 or at the time he wrote his declaration who are still -- who  
18 are on the restoration lists, who are waiting to be released.  
19 Those 97 individuals necessarily include people accused of  
20 Measure 11 crimes. And since we haven't seen any yet, we  
21 expect to see most of those later. We don't know when.

22 So one of the things I'd ask is when the Court  
23 assesses this, the effectiveness of this if the order continues  
24 in place, is to push out the date of the assessment from  
25 January 21st, because I'm afraid we're not going to have seen

1 the worst of the worse before then.

2 Now, turning to the less intrusive alternatives, Your  
3 Honor, the -- one of the things we suggested, which apparently  
4 has already been done, is eliminating the 30-day wait period  
5 for people who are considered able. As you can see from this  
6 chart -- again, Exhibit 2 to Mr. Wehr's declaration -- 70  
7 people were found able out of 154 released in the first 56  
8 days. That's working. So the change that wasn't really part  
9 of the order, but which apparently has been adopted based on  
10 Dr. Pinal's recommendation, is making a big difference in the  
11 population at the hospital, all of that without the risk of  
12 putting seriously mentally ill people back in the community,  
13 back into our jails at the worst case or back on the streets.

14 The other issue is this -- is people who don't -- no  
15 longer need a hospital level of care. We could reduce the time  
16 at the hospital -- the Court could reduce the time at the  
17 hospital for that kind of assessment so that more people can  
18 get out more quickly who no longer need a hospital level of  
19 care. The worry is under the Court's order, those people who  
20 need a hospital level of care are required to be released by  
21 March 15th, regardless of their state, regardless of whether or  
22 not they present a risk to themselves or others, regardless of  
23 whether there's a place for them to go in the community. The  
24 State considered all of that when the legislature adopted  
25 Senate Bill 295. There are all sorts of protections in there



1 for the community and for the individuals. The Court's order  
2 doesn't incorporate any of those, and we are, as the people who  
3 oversee them, very concerned about what happens when they come  
4 back to our communities.

5 So I'd ask the Court, one, to eliminate paragraph 3  
6 from the Court's order, and if the Court doesn't feel  
7 comfortable with that, at least provide some protections in  
8 there for individuals who should not be released. As I read  
9 the order, and I think as the State does, there is no  
10 flexibility. If someone meets their time limit, they have to  
11 be out of the hospital by March 15th. That could create --  
12 that will create dangers in the community and is not the best  
13 thing.

14 We've had one individual who went for a court  
15 hearing, found to be not meeting the standard for civil  
16 commitment, and who was released to the streets -- or to a  
17 hotel, I suppose. We have no idea where he is. And he was  
18 accused of a felony. More coming. And I'm worried about it as  
19 the person who is responsible to our community for our jail and  
20 for our healthcare system.

21 So I'd ask the Court to, as Ms. Vetto said, either  
22 eliminate the order or modify it or at least allow us to send  
23 people back who have decompensated. Also, I'd ask for the  
24 Court to consider extending the date for the assessment until  
25 after all of the people subject to the September 1st order have

1     been discharged from the hospital.

2             Thank you.

3             THE COURT: Thank you very much, sir.

4             Who is next among the intervenors?

5             MR. GARZA: I think I'll try the podium.

6             Good afternoon, Your Honor. Keith Garza,  
7     representing the judge amici.

8             Our brief, as the Court does recall, really does try  
9     to cut at this issue at the doctrinal level that the Court  
10    indicated it was primarily concerned with as an initial matter  
11    for this round of briefing. Our brief answered the questions  
12    that the Court put before the parties and did so, you know, in  
13    a way that we think did not really admit any response, and in  
14    fact there was none, there was no response, no objections, no  
15    brief filed taking issue with the analysis that the Court put  
16    forward. And we don't believe that the analysis that we have  
17    goes to whether this is a good idea or whether there are  
18    necessarily at least lesser intrusive means, but really kind of  
19    cuts primarily based on the *Stone* decision as to the  
20    preliminary inquiry of whether it is essential or necessary as  
21    an initial matter for the Court to have to override otherwise  
22    valid state law. And we find a lot -- and I think a lot of the  
23    other parties do as well in this court -- to be learned from  
24    the *Stone* decision.

25            And, you know, even more telling than the lack of

1 objection to the judges' brief is that in their response to the  
2 counties' amicus brief, plaintiffs, much like they did in  
3 response to our efforts to have the injunction against state  
4 court contempt actions dissolved, they came back and invited  
5 the Court, essentially offering no objection if the Court wants  
6 to essentially redraft the September 1 order to, quote, better  
7 support the scope of its order, which I think is telling, in  
8 that, you know, from the standpoint of an amicus here, now that  
9 we have an intervenor with a pending motion, the decision on  
10 which will provide an immediate -- you know, an appellate  
11 avenue for interlocutory review, it is our role to kind of  
12 offer the Court our ideas about what may be problems that we  
13 perceive with the way that the Court went about drafting and  
14 crafting -- or plaintiffs, more appropriately, because it was  
15 their order that they wrote, the September 1st order.

16           So, first of all, the *Stone* decision talking about  
17 kind of ratcheting up relief before you go to that step of  
18 overriding state law, right, whether it's essential to do so.  
19 And they talk there about the city in that instance being in  
20 the kind of unusual position of coming back and saying, well,  
21 actually contempt was something that should have been the  
22 Court's first effort, as opposed to telling the sheriff to  
23 override state law with respect to how long individuals need to  
24 stay in jail.

25           And here, of course, that hasn't happened, and the

1 Court's point is well taken that for that kind of remedy to  
2 take hold and effect, it's going to take some time. But I  
3 think you'll see in just about every one of these cases in  
4 which injunctive relief is being considered by a court or  
5 enforcement mechanisms, it's never an immediate -- an immediate  
6 beneficial response.

7 THE COURT: Can I ask a couple questions about  
8 contempt?

9 MR. GARZA: Sure.

10 THE COURT: So typically the best use of contempt is  
11 where the person can cure the contempt by relatively quick  
12 action. And here the problem with contempt, say, two years  
13 ago, early on in this litigation was that there wasn't any  
14 immediate path forward. It wasn't sort of through pure  
15 dereliction of duty that the delays were occurring. It was  
16 more complicated than that.

17 So if I had held the State in contempt, the next best  
18 move would have been to meet with Disability Rights Oregon and  
19 other interested parties, possibly with the aid of an  
20 independent expert, and try to craft a solution that would as  
21 rapidly as possible get them out of contempt and then move  
22 forward from there.

23 So isn't that what happened here, just skipping the  
24 contempt part that would have been designed to drive them to  
25 the negotiating table?

1 MR. GARZA: Well, I think what we put in our brief  
2 was that we found that the Court's very patient and kind and  
3 considered efforts to move the defendants towards compliance  
4 were sufficient to justify the Court taking additional action.  
5 And while at that point --

6 THE COURT: I guess what I'm asking is let's say that  
7 I'd run to the end of patience some time ago and found the  
8 State in contempt and presumably imposed a monetary penalty.  
9 What would have happened after that that would have been  
10 beneficial to this case?

11 MR. GARZA: Well, it's hard to know, but one thing  
12 that one would expect was perhaps the defendants would go to  
13 the legislature and ask for, I mean, additional resources so  
14 that they could meet the capacity that they, according to  
15 plaintiff, should have expected.

16 THE COURT: Which is, of course, as you know, exactly  
17 what happened here.

18 MR. GARZA: Right. We're not taking issue with the  
19 fact that the Court didn't do that before. We're saying we  
20 have a -- we're on the cusp of a full legislative session  
21 convening in several weeks, changes in leadership. This is an  
22 appropriate time to do that. We're not saying that the Court  
23 should have done it before, we're just saying that --

24 THE COURT: Just so I'm clear, what you're suggesting  
25 by way of the right course forward is to rescind the order, and

1 then you're suggesting I ought to at least consider holding the  
2 State in contempt?

3 MR. GARZA: If you go back to the August 16th order,  
4 with the exception of the injunction against state court  
5 contempt proceedings, which implements a number -- most, right,  
6 of Dr. Pinals' recommendations, and is permitting the State to  
7 make some progress towards compliance, a threat of contempt,  
8 and then at that point, you know, from the standpoint of, you  
9 know, further review of the Court's actions by the Ninth  
10 Circuit, it seems to satisfy the kinds of considerations that  
11 the *Stone* court said it was looking for and that were absent  
12 there.

13 THE COURT: Again, I'm just trying to nail down what  
14 your suggestion is. So what you're arguing is that the best  
15 course forward is to erase the current order, of course keep  
16 erased the ban on state court contempt, but implement the  
17 August order and then see where it goes?

18 MR. GARZA: That's what we asked for in the brief.  
19 That's precisely what we requested.

20 THE COURT: All right.

21 MR. GARZA: And to get back to the -- kind of the  
22 elemental considerations, you know, we took issue with the  
23 Court's determination that it was the defendants' attempt to  
24 comply with state law, both with respect to inputs to the State  
25 Hospital or to OHA's jurisdiction, and outputs -- outputs from

1 hospital level of care situations as the causal factors, you  
2 know, that created the constitutional violations, and we  
3 challenged the Court in that, respectfully, and really saw that  
4 as kind of going back to accepting an argument that it is an  
5 inability of a defendant -- a defendant's inability to comply  
6 with the Constitution that seems to be kind of promoted to the  
7 level of a defense when that's not been accepted before.

8 THE COURT: I'm not sure I understand that point.

9 MR. GARZA: Sure. So, in other words, the Court had  
10 indicated that it was -- by having to send people into the  
11 hospital and keep them there for a particular length of time,  
12 those statutes were -- it was following those statutes that was  
13 causing the constitutional violations, as opposed to lack of  
14 resources, inability to comply. It's like in the prison  
15 overcrowding situation. The inputs to that system are  
16 generated by juries finding defendants guilty, states enacting  
17 criminal laws, judges sentencing people. That's what puts  
18 people into the system. What keeps them in the system is the  
19 State's decision with respect to how long the sentences should  
20 be. And when it becomes the case that there is overcrowding or  
21 Eighth Amendment violations, it doesn't seem from our view of  
22 the authorities that it's been an accepted defense to say,  
23 well, it's not the defendant's ability or inability to comply  
24 that's causing the violations, it's the fact that the State has  
25 these otherwise legitimate statutes that they've enacted. And

1 so, in other words, before you can go and say that these are  
2 the problems that need to be fixed, these otherwise legitimate  
3 statutes, they need to be overridden. We think that the record  
4 hasn't been made to establish the basis for doing that yet.

5 THE COURT: I think I understand the argument. It is  
6 an interesting point when you think about dual sovereignty.  
7 Which should be more offensive to the State of Oregon, an order  
8 that contravenes OSH time periods or an order that requires the  
9 state legislature to fund significant increases in facilities?  
10 Do you have an opinion about that?

11 MR. GARZA: Could you rephrase that for me?

12 THE COURT: You're suggesting there are sort of two  
13 ways to go. One is to take account of the fact that delays  
14 getting from jail to OSH is driven at least in part by the fact  
15 that there's not a second or third OSH built up and ready to  
16 go, and the other is that it's affected by how long they're at  
17 OSH. If I shortened that time period, more people could come  
18 in in the front door.

19 So the first solution, which has -- which has been  
20 the subject of some -- in the vast body of cases involving  
21 judges imposing on the state what the Constitution demands,  
22 there are cases like your first example; that is, where a  
23 federal court orders a state to, you know, spend a lot of money  
24 doing something it hasn't spent a lot of money on yet. And  
25 that's part of your suggestion, right? That what I've missed



1 is the idea that one of the inputs resulting or causing the  
2 constitutional violation is, for example, lack of facilities.  
3 And it seems like if that's -- if you're right about that  
4 argument, that it flows necessarily that one of the solutions I  
5 should be imposing, if you're right about that, is to order the  
6 State to build more facilities, right?

7 MR. GARZA: Well, I think what you put in your  
8 August 16th order was -- really indicated that the State needs  
9 to comply with the Constitution and leave it to the State to  
10 decide the mechanism by which it does so. It may be that  
11 that's the mechanism that is really the only one that is  
12 effectively available, but it makes the State responsible for  
13 solving the problem that, as you had noted earlier, it created.  
14 And I think you took that as a quote from the *Stone* decision  
15 itself. I mean --

16 THE COURT: Thank you very much.

17 MR. GARZA: It's important that -- I mean, the judges  
18 here, obviously they didn't create, they don't maintain the  
19 mental health system. Their role is simply to interpret and  
20 apply the law, and in doing so to seek to ensure that the  
21 constitutional and statutory rights of all of those that come  
22 before it are vindicated and as well the public's interest and  
23 victims' interests, and in doing so that they act in fidelity  
24 in advancing the policies that Oregon's other governmental  
25 branches have enacted. And as this litigation has developed,

1 it is perhaps that element that is causing some of the deepest  
2 concerns that not only does the September 1 order override  
3 state law, but in doing so, and really at the suggestion of  
4 both the plaintiffs and the Court's neutral expert, there are  
5 at least two fundamental and long-held state policy decisions  
6 that seem to have given way to competing policy considerations  
7 that the plaintiffs seem to prefer. In other words, plaintiffs  
8 are not only seeking to -- seems that they're not only seeking  
9 to compel compliance with the Mink injunction but also the  
10 imposition of certain policy preferences in that process. So  
11 in Mink, the Ninth Circuit in 2003, one of the things that the  
12 Court said was that the seven-day admit period was something  
13 that comported with federalism concerns because it was  
14 consistent with -- Excuse me, I should have brought my water --  
15 a legislative choice that was evidenced by a statute that was  
16 then in effect in 1999, which said in Oregon get the  
17 aid-and-assist defendant to the State Hospital within seven  
18 days. That went away in 2001, but nonetheless, that was a  
19 policy choice that was evident in the statutes at that time.

20 And so one of the things that you had then, as you do  
21 now, from 1999 to today, is the legislature's deliberate policy  
22 decision that the maximum amount of time it's willing to devote  
23 to restoration is three years or the maximum sentence of the  
24 offenses that are involved. And that policy choice, even if  
25 the plaintiffs think that that time limit is too long, even if

1 the empirical evidence is such that it may in fact be too long,  
2 it's not something that plaintiffs have been able to argue is  
3 unconstitutional. It's not something Dr. Pinals has been able  
4 to say represents such an outlier among other states' decisions  
5 with respect to how much time and resources to commit to the  
6 restoration process. We're somewhere in the middle, maybe  
7 toward the higher end, but not on the outlier. And even then,  
8 that policy decision really touches upon some of the most  
9 fundamental considerations that a state can have, which is  
10 effecting the enforcement of its penal laws and the protection  
11 of its citizens from harm, even if it chooses to go about that  
12 in ways that others might find less than efficient. And this  
13 Court's September 1st order, the plaintiffs' drafted order,  
14 overrides that decades-old policy.

15 THE COURT: You keep using that phrase. Let me make  
16 my point, and then I'll hear from you.

17 I don't think that's probably your best foot forward  
18 because, you know, I didn't just loan somebody my pen and let  
19 them sign whatever they wanted. So it's not plaintiffs' order,  
20 it's this Court's order. If you have problems with it, if you  
21 think it's unwise, then you can go ahead and make that argument  
22 directly to me without hinting that I sort of unthinkingly  
23 adopted somebody else's approach here. This is my order. I  
24 signed it. I'm fully 100 percent responsible for it. You  
25 don't need to give me the out of blaming plaintiff for it.

1 MR. GARZA: I apologize for that, Your Honor. I  
2 didn't mean it that way.

3 You know, the concern we had in kind of going forward  
4 and growing is that there was in Dr. Pinals' third report some,  
5 I think, longitudinal evidence that over the last ten years  
6 there have been something like 214 or just over 200 individuals  
7 who have been in the restoration process for longer than a  
8 year, and that of that, that kind of winnowing down, ultimately  
9 there were only 46 individuals during that time frame who were  
10 ultimately convicted. And Dr. Pinals was very frank in stating  
11 that, you know, quote, from one point of view these  
12 prosecutions may represent the achievement of important  
13 government interests in the pursuit of justice, and at the  
14 other end, from other perspectives, the yield is very low, and  
15 that under the Court's September 1 order, it seems like it's  
16 that low yield kind of policy perspective that has been kind of  
17 put forward as the law at least temporarily in Oregon.

18 And there's -- and so that is a concern that not only  
19 is state law being overridden, but it seems to be being  
20 overridden in a way that is -- represents different policy  
21 choices that somebody might think an appropriately functioning  
22 mental health system should have.

23 THE COURT: Thank you very much.

24 MR. GARZA: Thank you.

25 THE COURT: Who is next?

1 MR. NEIMAN: Go ahead.

2 MR. WILLIAMS: I think it's appropriate for my  
3 position to go last.

4 MR. NEIMAN: Okay. I'm Eric Neiman, Your Honor,  
5 appearing on behalf of the health systems who are intervenors,  
6 Legacy, PeaceHealth, and Providence Health & Services - Oregon.  
7 We're also plaintiffs in the consolidated case of Legacy v.  
8 Allen.

9 I want to address the comment that you made about  
10 Section 2.b. of your September 1 order, which as the Court  
11 pointed out, essentially incorporates the status quo. I think  
12 the term the Court used was "status quo ante."

13 THE COURT: Fancy lawyer talk for the way it's always  
14 been.

15 MR. NEIMAN: Yeah, except it hasn't always been that  
16 way. It's only been that way since about the end of 2019, when  
17 the Oregon State Hospital decided that they were no longer  
18 going to take civil commitment patients unless an exceptionally  
19 high bar was met, the so-called expedited admission criteria.

20 And consistently since then the State has taken the  
21 position that it had to do that because of this Court's Mink  
22 order. And the Court will recall that that was the position  
23 the State took in the Bowman case, that they could not admit  
24 guilty-except-for-insanity patients because of the Mink order.

25 THE COURT: Just to be clear, you're referring to the

1 original Mink injunction at that point, right?

2 MR. NEIMAN: Yes.

3 THE COURT: Thank you.

4 MR. NEIMAN: Judge Hernandez addressed that argument  
5 head on by saying it was false, that there was nothing in the  
6 Mink order that entitled the State to prioritize aid-and-assist  
7 patients over guilty-except-for-insanity patients. That same  
8 argument applies to Section 2.b. of this Court's order, because  
9 what the State is doing is depriving an entire population of  
10 individuals who have had their liberty taken away,  
11 de-prioritizing them in favor of forensic patients, aid and  
12 assist, and guilty except for insanity. And we don't think,  
13 looking at the record before you leading up to August 16, and  
14 then September 1, from the transcripts of those hearings, that  
15 the interests of civilly committed patients were ever presented  
16 to you in Dr. Pinals' two reports that you had at the time, in  
17 argument of counsel, or in the briefing. And that is a  
18 remarkable omission because, in our view, this Court should not  
19 take the leap to overriding state law without considering  
20 collateral effects on other members of the population.

21 And I cannot explain why that perspective was not  
22 presented to the Court, but it was not, and it still has not  
23 been. So I'm here today to speak on behalf of individuals who  
24 have been civilly committed by Oregon courts, because there  
25 isn't anyone else to do that. Metropolitan Public Defenders

1 and Disability Rights Oregon, the plaintiffs, have  
2 understandably -- and I respect my friends across the aisle  
3 hugely -- focused their efforts on people in jail, and the  
4 State has on multiple occasions disclaimed responsibility for  
5 people who are civilly committed. But somebody has to talk to  
6 you about that perspective and the collateral effects of the  
7 order you entered. And the -- that effect is two-fold. And I  
8 think the Court alluded to this in your opening comments. One  
9 is that people who are civilly committed -- and it's a high bar  
10 to get civilly committed. These are people who are very ill,  
11 cannot access the State Hospital at all, absent extraordinary  
12 circumstances in which they hurt somebody or destroy property,  
13 they injure somebody. And we can look at the data and the  
14 record before the Court and see that under ten people have been  
15 admitted to the State Hospital this year because of civil  
16 commitment.

17 And the second point --

18 THE COURT: Do you know what the denominator is  
19 there?

20 MR. NEIMAN: Well, the denominator at the State  
21 Hospital is kind of a moving target.

22 THE COURT: No, the denominator of people who are  
23 civilly committed.

24 MR. NEIMAN: Yes. It's about 500 a year. So if we  
25 take 10 or 12 a year, we know a very small proportion of

1 civilly committed individuals have been able to access the  
2 long-term care they need at the State Hospital this year. I  
3 don't think you're going to hear any dispute that a long-term  
4 care setting is what's necessary for people who are -- have  
5 seriously persistent mental illness and are civilly committed.

6 THE COURT: And is that uniquely OSH, or is OSH just  
7 a very important part of a cluster of ways that can be handled?

8 MR. NEIMAN: Well, individuals who need long-term  
9 treatment need to be in a secure residential setting of some  
10 kind. The State Hospital represents most of that capacity by a  
11 long shot. There are a limited number of secure residential  
12 treatment beds around the state, but I'm going to say 90 to  
13 95 percent of the long-term treatment capacity is with the  
14 State Hospital.

15 THE COURT: Thank you.

16 MR. NEIMAN: And a lot of these individuals need to  
17 be there. The State won't admit them. And the Court has, by  
18 adopting paragraph 2.b., the Court has in a way given the State  
19 a safe harbor or permission to not meet the constitutional  
20 rights of that population of people.

21 We have cited extensively in our papers a line of  
22 federal cases talking about the massive curtailment of liberty  
23 and how somebody who is civilly committed has the right to  
24 resort to treatment to get their liberty back. A percentage,  
25 significant percentage of people who are civilly committed need



1 to access long-term treatment to get their liberty back.

2 THE COURT: And you view the constitutional issue as  
3 fundamentally the same as for aid and assist and GEI?

4 MR. NEIMAN: We do.

5 The second way that Section 2.b. is negatively  
6 impacting civilly committed patients is by loading more people  
7 into the system outside of the State Hospital, so it becomes  
8 more difficult to get care. And I know we're edging into the  
9 issue there that you're going to be addressing next year, which  
10 is is this a good idea, but to get to the first issue, what  
11 you've called the doctrinal bar, you have to conclude, we  
12 think, that by entering the order you did, you're not violating  
13 the constitutional rights to treatment in this case and the  
14 liberty of another population of patients won't be affected.

15 THE COURT: So your core argument, that's really a  
16 part of least restrictive method, right? A lot of the line of  
17 cases under that rubric suggests that I should look at  
18 collateral impacts, and those collateral impacts sometimes are  
19 merely harmful -- I don't mean that like that's not bad, but  
20 you're here suggesting not only are they harmful but it also  
21 violates constitutional rights of what at least to this order  
22 is a collateral group, right?

23 MR. NEIMAN: That's right. We're trading one set of  
24 constitutional violations for another, and that cannot be an  
25 acceptable result in our view.

1           If you have 500 people who are civilly committed a  
2 year, up to 180 days -- and we don't know what the total is  
3 because that's not data we're able to get from the State, but  
4 you're talking about hundreds of people who are spending  
5 thousands of days of treatment and an inability to access the  
6 care they need.

7           Now, taking Section 2.b. out of the order will allow  
8 state court processes, will give the Oregon State Hospital  
9 flexibility to admit civilly committed patients, will give --

10          THE COURT: Based on dangerousness? If you have  
11 three streams headed to OSH -- GEI, AA, and civil commitment --  
12 and those three streams exceed capacity, then what are you  
13 suggesting OSH do to decide who gets admitted if there is no  
14 Section 2.b.? The dangerousness or something else?

15          MR. NEIMAN: It could be acuity, how ill is somebody.

16          THE COURT: Acuity is a concept larger than  
17 dangerousness. So do you mean dangerousness or do you just  
18 mean acuity?

19          MR. NEIMAN: I mean it could be -- how the exact  
20 rating algorithm, admission algorithm, or admission criteria  
21 would look, I don't have an answer for you today.

22          THE COURT: You just mean they should have the  
23 flexibility to allow at least some civil commitments in?

24          MR. NEIMAN: Correct. And 2.b. takes away that  
25 flexibility, that judgment.

1 THE COURT: But unless that number is 100 percent of  
2 the people whose constitutional rights you think are being  
3 violated, then you only very partially solve the problem you  
4 raise, right?

5 MR. NEIMAN: Solving the problem partially is very  
6 important.

7 THE COURT: Well, it depends how partially. If you  
8 solve it by 5 percent, then you've gained very little ground  
9 and you've left 95 percent of the people in your view in the  
10 condition of a constitutional violation with no recourse.  
11 Right?

12 MR. NEIMAN: This is exactly the issue that Judge  
13 Hernandez faced in his comparison of robbing Peter to pay Paul.  
14 Shutting people out of the State Hospital altogether and out of  
15 long-term treatment who are entitled to be there is not an  
16 answer to the State Hospital overcrowding problem.

17 We think that 2.b. and -- Am I running out of time  
18 here?

19 THE COURT: No, because I'm in charge of the time.  
20 So --

21 MR. NEIMAN: We think that 2.b., Section 2.b. and 3  
22 should come out of your order. And the reason is that  
23 Dr. Pinals had a package of recommendations --

24 THE COURT: That part I've followed perfectly well.  
25 I'm not giving that argument short shrift, but you've made it,

1 I've read it, I know what you're saying here. I'm more curious  
2 about this last point, then.

3 MR. NEIMAN: Let's talk about it.

4 THE COURT: Do you agree that of these three streams,  
5 that if you were to measure dangerousness -- which I'm going to  
6 use instead of acuity even though it might be something else --  
7 that the smallest stream therefore running into OSH would be  
8 civil commitments, that in general they're going to -- they're  
9 going to pass a dangerousness bar less often than, say, felony  
10 AA commitments?

11 MR. NEIMAN: If that's the admission criteria the  
12 Court wants to use, yes.

13 THE COURT: That's not the one I want to use. I'm  
14 just guessing what it might become.

15 MR. NEIMAN: I think I agree with that.

16 THE COURT: The other thing I'm raising as a concern  
17 is your suggestion is that it runs the chance of being a very  
18 partial solution. What you object to is the idea that the door  
19 is absolutely shut and you can't even get in. But your answer  
20 is to open the door for perhaps a very small percentage of your  
21 affected population.

22 MR. NEIMAN: Or a percentage. I don't want to go to  
23 very small. A percentage. Because where are they to get the  
24 treatment otherwise? And that's why I think --

25 THE COURT: I appreciate the problem you raise. I'm

1 trying to explore your solution. Your solution is to open the  
2 door to people who have been civilly committed who then compete  
3 with AA and GEI under some sort of algorithm or rubric and then  
4 some of them get in. That's your proposed solution?

5 MR. NEIMAN: Right.

6 THE COURT: All right. Thank you. Thank you very  
7 much.

8 MR. NEIMAN: I'm done?

9 THE COURT: Yes, sir.

10 MR. NEIMAN: Thank you for your time, Your Honor.

11 THE COURT: Thank you for your argument. I  
12 appreciate it.

13 Mr. Williams.

14 MR. WILLIAMS: Thank you, Your Honor.

15 On behalf of the amicus district attorneys, we've  
16 taken a different approach, which is why I wanted to go last,  
17 because we chose not to challenge the doctrinal questions. We  
18 have been from the outset of our involvement engaged in  
19 conversations with counsel for the plaintiffs and the  
20 defendants, and then the intervenors and other amicus from  
21 literally from day one of sort of practically speaking how does  
22 this look, knowing that you ask us to wait until January, in  
23 effect, to raise the more precise factual questions of how this  
24 was working and whether or not the, as you termed it, the  
25 potential parade of horrors pans out or not. And so I don't

1 know that it's appropriate for us at this juncture to weigh in  
2 on the argument.

3 THE COURT: If you want to save your fire for  
4 January, that's fine with me.

5 MR. WILLIAMS: Well, I have another alternative.

6 THE COURT: Go ahead.

7 MR. WILLIAMS: Which is what I've been promoting from  
8 the outset, which was we had a Zoom in late September with some  
9 proposals for amendments and modifications on behalf of the  
10 district attorneys that are very practical but very important  
11 because, for instance, right now what's not included is the  
12 Ballot Measure 11. It doesn't include the attempt crimes in  
13 the categories. And that seems a mistake to do that, and we  
14 simply propose a modification of the Court's order to include  
15 all of those crimes.

16 And also we'd like to have there be an individualized  
17 exception modification so that district attorneys can bring  
18 these issues to the Court for particular individuals based upon  
19 their underlying pending crimes, the seriousness of their  
20 criminal histories. Category C isn't even part of this  
21 discussion under the State's criminal history categories. It  
22 needs to be because these are important crimes based upon  
23 dangerousness, and a person's criminal history should play some  
24 part of this.

25 The notification that's currently in place isn't good

1 enough, to be quite frank about it. Just relying upon the  
2 e-court system doesn't work for the district attorneys,  
3 particularly in the larger counties. I've asked this question  
4 including last week during the Zoom with Mr. Allen, Patrick  
5 Allen, and the answer I got was, well, it's complicated. We  
6 can't really figure that out. That's not our responsibility.

7           There's a simple solution of the Oregon District  
8 Attorneys Association being provided with a direct notification  
9 so that they can play a part in notifying the district  
10 attorney's office so we know who is on the list to be  
11 discharged.

12           Also important is providing a list of individuals  
13 identified as eligible for discharge now and 60 days' notice,  
14 which from a public safety standpoint and from notification to  
15 the victims of these crimes is rather an important point,  
16 especially when you tie into the discussion that's been going  
17 on, which is, I'm sorry, but the system is broken. The mental  
18 health system in Oregon is broken. If that wasn't true, Judge  
19 Panner's work of twenty -- what? -- two years ago would have  
20 been accomplished. But here we are, and for good reasons,  
21 bringing the charges, if you will, on behalf of the plaintiffs.  
22 It's just something that I think the reality is, you know, as  
23 pointed out, as counsel for the counties and the judges and the  
24 hospital associations, compelling arguments about not all the  
25 stakeholders were at the table prior to your order of

1 September 1st.

2           So the way we viewed this is, okay, other people are  
3 going to challenge the doctrinal question. We want to  
4 challenge the reality of what district attorneys are looking at  
5 in terms of public safety and victims' rights. And so the ask  
6 at the time in late September was we reach out to the Court and  
7 ask, because I was made aware by counsel for plaintiffs that  
8 Magistrate Beckerman has been involved in this case with  
9 settlement conferences over time, and it seems like to me, just  
10 from a practical solution, respecting whatever your decisions  
11 are based on the doctrinal questions, this is an opportune time  
12 in my view for everyone around these tables this afternoon to  
13 come up with practical solutions that ultimately may lead to  
14 the State of Oregon fixing a broken system, because folks  
15 represented by counsel in this room today have identified the  
16 issues over time, and the more recent clarifications of what  
17 that looks like, and so why not use the time to work with in a  
18 settlement conference or conferences to identify what could be  
19 done? How do we work with the Court to make realistic advances  
20 that -- who knows, with the upcoming legislative session, we've  
21 got a governor-elect who obviously, not just based upon  
22 political advertisements on TV, but there's obviously an  
23 awareness that something needs to be done to work with the  
24 legislature to bring about, to fix this for the issues that  
25 this Court has identified through the work that's been done by



1 Dr. Pinals and others. What an opportune time for the State of  
2 Oregon to actually do something to fix the problem.

3 And so as of last Thursday and the announcements of  
4 Mr. Allen, and Mr. Allen submitting their resignations, there's  
5 going to be new leadership at the Oregon Health Authority and  
6 the Oregon State Hospital, so where all this lands is yet to be  
7 seen, but the reality is, as I view this, you know, we can go  
8 on for years litigating what the issues are. We can do that.  
9 But we can also come up with solutions through settlement  
10 conferences to assist this Court in helping to right the ship,  
11 if you will, of how to make this work.

12 So that's our position, that's our argument. I can't  
13 think of a better time for us to engage in those endeavors,  
14 given what I've just laid out in terms of going forward. I'm  
15 not interested in the blame game. Those efforts are  
16 meaningless to me. And I think with identifiable amendments,  
17 modifications that my clients have identified and submitted to  
18 counsel as of late September, my recollection is, and I could  
19 be corrected today, but I sought the insights of every attorney  
20 in the room on whether or not they would be interested in those  
21 settlement conferences, and my recollection is the answer was  
22 yes. So that's our ask.

23 THE COURT: Thank you very much, sir.

24 For the parties for the litigation, I gave you some  
25 time to respond. You don't have to, but you can take whatever

1 time you think is appropriate to respond.

2 Who will go first?

3 MS. COOPER: Your Honor, if it pleases the Court,  
4 plaintiffs can respond to the intervenors, I can respond to the  
5 county counsel, and then my colleagues can respond to the  
6 prosecutors and the hospitals.

7 THE COURT: Thank you very much.

8 MS. COOPER: Good afternoon. My name is Emily  
9 Cooper. I represent Disability Rights Oregon on behalf of  
10 plaintiffs DRO.

11 So I want to respond to the arguments raised by  
12 county counsel earlier. I think, if I understand this Court's  
13 orders, today was to be a factual question about whether or not  
14 there were any other least restrictive options for this Court  
15 to consider before issuing its modification, and that the  
16 larger question of whether or not this Court has the authority  
17 to modify its own injunctions was going to wait until January  
18 to see if some of the issues had played out.

19 And what I wanted to point out is the evidence that  
20 has been provided by county counsel is largely -- and by the  
21 hospitals are largely anecdotal, inadmissible, or as county  
22 counsel themselves argued, some of the anecdotal information  
23 happened prior to the September 1st order. So the issue of  
24 recidivism is not new. The issue of people entering the  
25 criminal justice system repeatedly in a year for behaviors

1 related to their mental health is not new and hasn't changed  
2 since September 1st, 2022.

3           What we do have is undisputed facts from the bench  
4 trial that Judge Panner had in 2002. And those undisputed  
5 facts are that jails are not designed to treat, they're  
6 designed to punish. And as a result, people with mental  
7 illness are harmed sometimes irreparably. For example, one of  
8 the findings of fact was specifically on the suicide risk in  
9 jail. Washington County, one of the intervening counties in  
10 this case, has had three people die in its jail in 2022 alone,  
11 and that was all prior to September 1st. One of those  
12 individuals was named Mr. Bryce Bybee. That individual was on  
13 waiting for aid and assist and had waited more than seven days.

14           So you look at those facts. That is what is  
15 motivating plaintiffs to ask this Court for relief, because  
16 even though the parties through the past three years of  
17 multiple contempt motions, two separate appeals to the Ninth  
18 Circuit, we weren't seeing the needle shift. That's why a year  
19 ago the parties agreed to sit down with Dr. Pinals, a neutral  
20 expert, to do a compliance plan, a neutral path forward of how  
21 we were going to fix this problem. And so unlike it being just  
22 something we plucked from the sky, we worked with a national  
23 expert to issue a series of recommendations, and despite those  
24 efforts with the State and with the State's clients to rectify  
25 the problem, the waitlists were still not going down at a pace

1 we were comfortable with.

2 And the county counsel I think misunderstands some of  
3 the data elements. Mr. Carr mentioned Table 1, showing the  
4 average waiting time compared to how long someone waited.  
5 That's because Table 1 is a snapshot of who was currently on  
6 the waitlist. That was a snapshot. The average amount of time  
7 is 15 days. That is different from looking back once someone  
8 is admitted to the State Hospital and seeing how long they  
9 waited. In July of 2022, it was approaching 40 days that  
10 people were waiting. And, again, Mr. Bybee and others like him  
11 were dying. That's why plaintiffs asked this Court for more  
12 relief.

13 And that risk to people waiting in jail is not new.  
14 I have in front of me Docket 118, which interestingly is a  
15 declaration of the Washington County Sheriff Pat Garrett. And  
16 if you go back and look at this docket, he talks about in 2019,  
17 the risks of harm people have waiting in jail. This is not  
18 new. So to set this dichotomy up as if Disability Rights  
19 Oregon, who is in charge of protecting and promoting the rights  
20 of all Oregonians with disabilities is somehow being arbitrary  
21 and capricious or working in cahoots with the State is flatly  
22 wrong. We are trying to mitigate the harm to our clients in  
23 the state by getting people to treatment and so they're not at  
24 risk of dying. That's why we're here in front of this Court.

25 THE COURT: Is it accurate to say that your focus and

1 the universe of your concerns for your clients does not really  
2 include in any meaningful way the interests of people civilly  
3 committed?

4 MS. COOPER: That is wrong. And I can give you  
5 probably more time than you would want me to spend today, but I  
6 will point to a few things. First of all, Disability Rights  
7 Oregon has had standing based on Oregon Advocacy Center v. Mink  
8 to represent the interests of all people with disabilities in  
9 the state of Oregon. We don't have a financial interest in  
10 where they get care, and we don't have any relationship or dog  
11 in the fight, as they might say, of where they get care. I  
12 think the difference here is what we're talking about with  
13 civil commitment patients and the hospital intervention is  
14 should that treatment happen at a private hospital or should it  
15 happen at the State Hospital. That to me is a different  
16 calculus than someone waiting in jail where there is no  
17 treatment and the liberty interests related to that, which was  
18 articulated back in the '70s, which is the duration of  
19 someone's confinement has to bear some reasonable relationship  
20 to why they're being confined.

21 THE COURT: The representation in this case is sort  
22 of forensically driven, but the mission of your organization  
23 could at least include clients that are civilly committed or  
24 not?

25 MS. COOPER: Not only could but it does. Right now

1 Disability Rights Oregon has the county contract for Multnomah  
2 County to represent individuals being held on civil  
3 commitments.

4 THE COURT: Thank you very much.

5 MS. COOPER: The other argument that county counsel  
6 raised was that Dr. Pinals didn't issue in her report a legal  
7 conclusion about restoration wait times being the least  
8 restrictive alternative. Dr. Pinals is a clinician and is not  
9 a judge, so it's not her place to issue a finding or a  
10 conclusion of law.

11 THE COURT: I don't need to hear more oral argument  
12 on findings. I think it's a fair point. I think it's easy to  
13 understand why those weren't the heavy focus of parties who had  
14 come to agreement, but having it raised in an important way,  
15 then I am going to make those findings if I view them as  
16 appropriate once I've considered all the arguments today.

17 MS. COOPER: I understand.

18 And I think again you referenced this, Your Honor, at  
19 the beginning of the hearing about this process and how long  
20 Dr. Pinals for nearly a year has been studying the Oregon  
21 system, and all of her reports and all of the studies that she  
22 has cited to. The one thing I wanted to point out is that not  
23 a single intervenor or amicus until Mr. Williams suggested  
24 potential settlement has offered any compliance solutions to  
25 allow the constitutional violations that are happening today to

1 be mitigated any quicker. If anything, they contradict  
2 themselves by on one hand raising federalism concerns and then  
3 asking the Court to force the defendant State Hospital and  
4 Oregon Health Authority to operate their services in a way that  
5 contradict even what defendants want to do themselves, and  
6 perhaps not conspicuously, only involve state resources. And  
7 this bears no reasonable relationship to the principles of  
8 federalism. The parties actually standing before this Court  
9 and more directly affected by your September order do not claim  
10 that this Court's order is out of scope or excessive. And  
11 that's why we ask this Court to deny any appeals from a  
12 nonparty, because they don't embrace or advance the interests  
13 of Oregonians with disabilities or the constitutional  
14 violations we seek to end. And for this reason, we want to go  
15 back to the record and look at what Dr. Pinals said and her  
16 projections from her June report that without this Court  
17 implementing the restoration wait times by December of next  
18 year, there will be over 250 individuals waiting in jail for  
19 restoration services. It's that data, those projections that  
20 we sought this Court's relief to say let's instead of waiting  
21 for hundreds to wait in a year from now, reach compliance by  
22 February of 2023.

23 THE COURT: Thank you very much.

24 Who is next?

25 MR. STENSON: Your Honor, I'm just going to briefly

1 respond to the hospital's argument they made.

2 THE COURT: Go ahead.

3 MR. STENSON: So just to briefly correct the record,  
4 it's been repeatedly stated that Dr. Pinals didn't do anything  
5 or examine the question of civil commitment at all, but there's  
6 actually frequent reference to civil commitment patients in her  
7 reports. In her June report, on page 15, she reports meeting  
8 with directors of the community care organizations, and they  
9 extensively discuss the exact issue that the hospitals raise,  
10 which is that -- the difficulty in finding civil commitment  
11 beds and the challenges created by the excessive -- or by the  
12 number of people in aid-and-assist condition who are using the  
13 beds at the hospital. So it's not correct to say that she  
14 didn't raise that issue.

15 It's also not correct to say that the plaintiffs  
16 didn't raise that issue, because in the very motion that led to  
17 this September order, which is Docket 252, on page 5 and 6, we  
18 say that we're concerned about people with mental illness  
19 continuing to lack community behavioral resources, including  
20 those --

21 THE COURT: Would you slow down a little when you're  
22 reading.

23 MR. STENSON: Thank you very much, Your Honor.

24 -- including those ordered for civil commitment  
25 languishing in hospitals.



1           So we've actually taken that into consideration in  
2     our role. As Ms. Cooper said, it is part of Disability Rights  
3     Oregon's role to advocate for all people in the system.  
4     However, I don't think that it is appropriate to draw a  
5     comparison between GEI detainees and aid-and-assist detainees  
6     who are languishing in jail versus those who are in a community  
7     hospital, especially one with behavioral placements like Legacy  
8     that are designed to take people with behavioral health needs.

9           THE COURT: You agree that all three involve  
10    deprivation of liberty interests, but you just think the scope  
11    of the deprivation is significantly different?

12          MR. STENSON: I would not necessarily agree with  
13    that, Your Honor, because there are people who can be  
14    appropriately treated in community hospitals, and in fact  
15    that's part of the reason that Legacy -- excuse me, that the  
16    behavioral health hospitals exist. Providence, according to  
17    its own complaint in the joint matter, says I believe they have  
18    90 behavioral health beds.

19          I think it would be an open question and it would be  
20    a factually intensive question whether a person with a  
21    particular mental illness, whether their needs were being met  
22    in a community hospital or not. And that might depend on the  
23    acuity of their condition, that might depend on the resources  
24    that are available at that hospital, but you can't -- the  
25    intervenors are essentially asking the judge -- the Court to

1 take judicial notice of the fact that someone's rights are  
2 automatically being violated by being in a community hospital,  
3 and that's wildly different from being in a jail cell.

4 To go back to the original fact findings in this case  
5 from 2002, some of the core findings were that jails exposed  
6 people to an excessive risk of death, especially by suicide,  
7 that they had no mental health treatment capacity at all or  
8 limited treatment capacity at all, that they used isolation and  
9 segregation and other punitive measures to address mental  
10 illness rather than to actually treat it or to have regimens  
11 that took their needs into account.

12 Now, there's been very little affirmative evidence  
13 put forward, and I don't think that the hospitals would like to  
14 say that the treatment that they offer in their community  
15 hospitals, in their dedicated behavioral health beds is  
16 equivalent to being inside a concrete jail cell. If that is  
17 their position, I suppose they could make that representation,  
18 but the level of deprivation that was documented at trial in  
19 2002 for the average mental health detainees in a jail cell  
20 does not compare to any of the evidence that's been put forward  
21 so far in terms of the degree of deprivation that one would  
22 experience in a community hospital surrounded by medical staff.  
23 And, in fact, there's been little if any admissible evidence  
24 put forward by any of these intervenors and amici that would  
25 properly address these questions. The --

1 THE COURT: Do you agree that Section 2.b. presents  
2 zero opportunity for someone civilly committed to make it into  
3 OSH?

4 MR. STENSON: No, I do not. In fact, it's belied by  
5 the declarations that were offered by the hospitals. They  
6 specifically reference someone who left OSH, went back to a  
7 jail, spent two weeks at a community hospital, and then was  
8 returned to OSH, using that expedited process after being  
9 civilly committed. So I don't agree that their evidence is  
10 admissible, but it clearly shows that at least one person made  
11 it from a hospital to -- from a community hospital to the State  
12 Hospital in two weeks.

13 THE COURT: Focusing less on the degree of  
14 deprivation for civil committees, do you agree that there are  
15 people who are civilly committed who because of the high bar  
16 set forth in Section 2.b. might actually be more dangerous to  
17 the community than some people admitted to OSH through AA or  
18 GEI?

19 MR. STENSON: I don't believe there's any evidence on  
20 the record before the Court that would respond to that.

21 THE COURT: We just don't know that based on actual  
22 evidence?

23 MR. STENSON: We have -- the parties have put  
24 forward -- under this Court's guidance, we've put forward now I  
25 think it's three reports through Dr. Pinals, where an expert

1 has been looking at this and taking this into account in her  
2 recommendations. That's been part of this process from the  
3 beginning. And saying -- supposing that there might be  
4 somebody out there who is really dangerous, you know, that's  
5 not what courts are here for. We're here to test the truth.  
6 Suppositions and hypotheses are not the basis for overturning  
7 an order.

8 THE COURT: All right. Thank you very much, sir.

9 Mr. Merrithew, are you also speaking today?

10 MR. MERRITHEW: Yes. I was asked to respond to  
11 Mr. Williams' and Mr. Garza's arguments.

12 My response to both of those is largely the same, and  
13 that is that both have suggested that stakeholders in the  
14 behavioral health system were left out of the Court's decision.  
15 And I suppose that's true in the abstract, but this is not a  
16 legislative body. We are here to enforce an injunction. There  
17 were two litigants in 2002 who led to the injunction that Judge  
18 Panner ordered, and we --

19 THE COURT: Is there a point -- you do agree that the  
20 case law fleshing out what it means to impose the least  
21 restrictive means for enforcing the injunction suggests that  
22 collateral consequences is one thing I should look at, right?

23 MR. MERRITHEW: Certainly, Your Honor.

24 THE COURT: And "collateral" by definition means  
25 people who aren't litigants.

1 MR. MERRITHEW: That's right, Your Honor.

2 THE COURT: So to say, hey, there's collateral  
3 consequences you didn't think about is a fair argument?

4 MR. MERRITHEW: It's a fair argument in the abstract  
5 but ignores the record evidence. That is precisely what  
6 Dr. Pinals has spent the last year doing. She didn't just talk  
7 to the plaintiffs and defendants. She looked at the system as  
8 a whole in order to come up with recommendations that this  
9 Court can make.

10 THE COURT: So moving then to Mr. Williams' point,  
11 you don't pose any real objection to finding a way to create  
12 more input by some of the intervenors or amici here in the  
13 future, right?

14 MR. MERRITHEW: It depends on what that looks like  
15 frankly, Your Honor. If it means that we are consistently --

16 THE COURT: That's all the answer I need, because it  
17 depends what it looks like means there is a path forward, it's  
18 just not carte blanche. You don't want to say that they become  
19 intervenors or parties if they're not otherwise qualified to do  
20 so, right?

21 MR. MERRITHEW: That's right, Your Honor.

22 THE COURT: Thank you.

23 Ms. Potter?

24 MS. POTTER: Thank you, Your Honor. Pretty briefly.

25 As you know, this was not our motion. I just wanted

1 to note, as has been discussed, the subject of how the State  
2 Hospital can best meet its obligations has been the subject of  
3 litigation for some years now, and the request was made by the  
4 plaintiffs in the past for this Court to enter an order that  
5 would override state law, and at that time we have always been  
6 able to come back to this Court and say, hang on, we have ideas  
7 for things that we can do within the system, within the  
8 structure that has been created, and my clients have really  
9 moved heaven and earth with an awful lot of things coming at  
10 them to keep moving forward.

11 THE COURT: Up to and including a new facility,  
12 right?

13 MS. POTTER: Up to and including opening up portions  
14 of the second facility, yes, Your Honor.

15 We requested and the legislature gave us \$1.3 billion  
16 for this biennium. 90 percent of that will have been spent by  
17 the end of this calendar year. OHA is continuing to move  
18 heaven and earth. We are not opposed -- we did not oppose the  
19 motion this time because we have run out of the ability to tell  
20 you we have a plan for coming back into compliance under the  
21 system as it is now. We don't have a reason to tell you that  
22 we can do this without something like this Court's  
23 September 1st order. And so that's just a point that I wanted  
24 to make. I think Your Honor knows better than anyone this has  
25 not been a -- historically been a situation in which there has

1 been collusion. There's been quite a bit of back and forth on  
2 this. We did agree to come together with a neutral expert, and  
3 she's been very helpful in identifying options. And we don't  
4 have a reason to object to the recommendations that she's made.  
5 And that was the standard that was set out in our agreement.

6 I would like to note the statement by Ms. Vetto that  
7 a court cannot recommit if a person loses the ability to aid  
8 and assist. I don't believe that is the position that the  
9 hospital has ever taken. A person cannot yo-yo back. A court  
10 cannot say, oh, I'm actually just going to send you back, get  
11 going. Based on this Court's order, if a person goes back to  
12 jail and proceeds in their presentation of their criminal case  
13 and loses the ability to aid and assist, I don't believe the  
14 hospital has ever taken the position that a new order cannot be  
15 entered.

16 THE COURT: Including in an FAQ? Including one of  
17 the frequently asked questions online?

18 MS. POTTER: That's correct. That's correct.

19 THE COURT: Thank you.

20 MS. POTTER: The other thing I would note is  
21 objective criteria would be helpful. There have been all sorts  
22 of conversations about dangerousness and sentencing grids and  
23 things that might be put into place rather than this Court's  
24 order, and for any -- if this Court were to alter its order in  
25 any way, something that is objective, such that the hospital

1 knows whether it is in compliance with that order would be  
2 important for the hospital.

3 THE COURT: You don't want me to just order you to do  
4 the right thing?

5 MS. POTTER: As long as you're willing to accept that  
6 we did the right thing.

7 THE COURT: Thank you.

8 Let me see what I can do today. I'll issue a written  
9 opinion later. But I appreciate the serious arguments that  
10 have been made, and I take them seriously. I recognize that  
11 it's difficult for lawyers to, you know, look a judge in the  
12 face and say, we think you're wrong or unwise, but I've taken  
13 this very seriously and it's been helpful. So I appreciate the  
14 input here.

15 There are a couple things I can do right away. One  
16 is to make clear on the record what Ms. Potter has just said,  
17 that nothing in my order prohibits the State, particularly  
18 through the findings of a state trial judge, from dealing with  
19 someone who had competency restored as one example, goes back  
20 to the criminal justice system, and subsequently loses  
21 competency. We know competency is lost because a hearing was  
22 held and someone found that person no longer competent. That  
23 person is to be treated just like they were treated the first  
24 time they weren't found competent. And that's how that goes,  
25 and nothing in the order prevents that.



1           What is prevented is some sort of quickie solution,  
2 where somebody just says, well, just go back, and nobody  
3 clarifies whether that's like an informal civil commitment or  
4 an actual finding of noncompetency or something else. But if  
5 someone is found not competent, then they're not competent, and  
6 it doesn't matter if it's their second time or their first  
7 time.

8           I'm also grateful particularly to Ms. Vetto for  
9 arguments about a lack of findings of least restrictive  
10 alternative, and that wasn't adequately done by me the first  
11 time around. I will do so. I do believe the context here  
12 reflects it in the sense that it was months -- actually years  
13 of effort to try many other things without adequate success  
14 before the parties, with the help of a renowned expert, worked  
15 through that for months to come up with a solution that we  
16 thought would allow the State the only way we could think of to  
17 allow the State to come into compliance, and as Ms. Potter has  
18 suggested, a lot of money and a lot of effort preceded that  
19 order. So I'll make those findings in the near term.

20           Dr. Pinals has consulted with a lot of different  
21 people, but not all -- not with all of you here. And there is  
22 input that would be useful to receive from all of you going  
23 forward. I'm going to start informally. My esteemed colleague  
24 Judge Beckerman is here, and I'm going to call upon her. She's  
25 willing to help fold your input into the coming status hearing

1 as best possible. I don't know the right way to do that yet,  
2 but it will start out just informally, and it may become more  
3 formal. And I'm starting with Judge Beckerman rather than  
4 Dr. Pinals just as a better place to start for some of the  
5 arguments that are more -- more textual analysis of the legal  
6 arguments you've made about the adequacy of the order, which is  
7 more within Judge Beckerman's expertise than Dr. Pinals', but  
8 in no way am I suggesting that Dr. Pinals wouldn't be included  
9 in all of these conversations also, but I want to make sure we  
10 take a hard look at the source of arguments about text that are  
11 *raison d'etre* lawyers everywhere. So we'll stick with that for  
12 now.

13 And then I'll make a decision as soon as I can about  
14 the actual motion and respond to it in writing, but for now you  
15 should assume that just moving forward, but with the  
16 clarification I've offered today on implementation of aid and  
17 assist, and with the idea that Judge Beckerman will try to fold  
18 more of your input for refining the order so that it moves  
19 forward in a more streamlined way.

20 Thank you all. We'll be in recess.

21 THE COURTROOM DEPUTY: All rise. Court is in recess.

22 (Proceedings concluded at 3:15 p.m.)  
23  
24  
25

--o0o--

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

*/s/Bonita J. Shumway*

*December 6, 2022*

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

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